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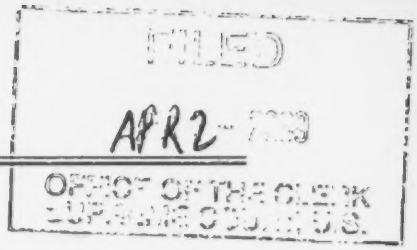

In The

Supreme Court of the United States

AGRIS PAVLOVSKIS,

Petitioner,

v.

CITY OF EAST LANSING,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Michigan

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS M. HITCH (P25558)
MCGINTY, HITCH, HOUSEFIELD, PERSON, YEADON & ANDERSON, P.C.
Attorney for Respondent
601 Abbot Road
East Lansing, MI 48823
(517) 351-0280

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF CASE

Petitioner is seeking review by this Court of an unpublished decision of the Michigan Court of Appeals which upheld two local ordinances of the City of East Lansing that together allowed neighborhoods to petition the City Council to impose restrictions on their own rights to rent their property.

Ordinance 1035C allows neighbors in certain residentially-zoned districts to petition the City Council for a zoning ordinance which would either prohibit an owner from obtaining a rental housing license or restrict rental licensing to owner-occupied rental property. Ordinance 1035C establishes a number of procedures that the property owners must go through defining the area and petitioning for the restriction, including the requirement that they obtain signatures of two-thirds of the property owners within the proposed district. A petition to remove the particular zoning designation would require only a majority of the property owners (Section 50-31, Appendix A).

Ordinance 1097 is the ordinance which established the rental restriction district that included Petitioner's property. The petition and the ordinance were for the most restrictive district of those available under the ordinance which, in this case, prohibits owners from obtaining any rental housing license.

Generally, the City requires a rental housing license if someone other than the owner's family is going to reside on the premises. There are, of course,

a number of exceptions to the requirement for obtaining a rental housing license that are delineated in the City's rental licensing ordinance (Section 1001.2 – Appendix B). "Family" is broadly defined to include non-traditional families referred to as "domestic units." (Appendix C).

Petitioner raised federal questions in the lower court only in the most general of terms and only in the "wherefore" clause of Counts I and II of the Amended Complaint. Likewise, other than to mention the existence of the Fourteenth Amendment in their brief on appeal to the Michigan Court of Appeals, Petitioner provided no analysis of the U.S. Constitution nor did he cite any authority analyzing the U.S. Constitution. Not surprisingly, the Michigan Court of Appeals' decision does not treat this as a question of federal law and cites no federal law or federal authority in its opinion either.

REASONS FOR DENYING THE WRIT

I. WHETHER THE ORDINANCE VIOLATES THE MICHIGAN ZONING ENABLING ACT IS NOT A FEDERAL QUESTION.

Petitioner's first argument fails to identify a federal question for which this Court would have jurisdiction. Rather, Petitioner asserts that the East Lansing zoning ordinance violates the state's Zoning Enabling Act. There is no attempt to claim that this

would somehow be a federal question within the jurisdiction of this Court.

Even if this issue could somehow be deemed a federal question, this specific question was neither presented to nor decided by the Court of Appeals (Petitioner's Appendix, p 10-15). Nor was it raised by Petitioner in his application for leave to appeal from the decision of the Court of Appeals. Rather, this issue was presented to the Michigan Supreme Court in an amicus brief filed in support of Petitioner's application for leave to appeal.

Even if one were to look past all of the procedural irregularities in presenting this issue to this Court, the issue lacks merit. Petitioner inaccurately classifies the zoning restriction as a regulation of ownership as opposed to a regulation of a use. Rental housing in a college community is big business given the number of transient students. East Lansing has been dealing with the conflicts between this particular use and owner-occupied residential dwellings for many, many years. Zoning, by its very nature, is the authority of government to separate conflicting uses. Petitioner himself acknowledged the conflicting nature of rental properties and owner-occupied properties in East Lansing during his deposition and had no issues with the goals behind the City drawing lines to separate the two. (Petitioner's Transcript, Appendix D, p 26-28). He only felt that his property should not be included within the line drawn by the residents who petitioned City Council for the

particular ordinance that affected his property. (Appendix D, p 35).

II. THERE IS NO MERIT TO PETITIONER'S CLAIM THAT THE ORDINANCE IS NOT RELATED TO A LEGITIMATE GOVERNMENTAL INTEREST.

Petitioner's claim that East Lansing's zoning restriction violates Petitioner's substantive due process rights is without merit. As recognized in *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926), in considering a substantive due process challenge to a zoning ordinance, the court does not look to the abstract but considers it in connection with the circumstances and the locality. If the validity of the legislative classification for zoning purposes is debatable, the legislative judgment must be allowed to control. *Id.* at 388.

The City of East Lansing has been a college community since Michigan State University was first established as Michigan Agricultural College in 1855. Over the years, however, as a result of changing markets and economic demands, the City has seen many of its single family homes converted to rental properties in the nature of miniature apartment buildings to accommodate the increased demand for rental housing. Watching the conversion of its housing stock to rental housing, the City saw the deterioration and deleterious effects the "creep" of rental

housing had into the areas formerly owner-occupied. It heard its residents complain that their ability to peacefully enjoy their own property, as well as their property values, were being diminished because of the conversion of their neighbors' single family homes to rental properties. Most often, the homes were being occupied by transient college students whose clash of lifestyles with owner-occupied homes became a constant source of conflict.

Efforts to address the issue through density restrictions in accordance with those approved in *Village of Belle Terre v. Borras,* 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974), have helped but have not been completely successful. Likewise, enforcement of noise regulations and property maintenance regulations is helpful but insufficient to alleviate the ever-expanding problem and conflict.

Petitioner, as he did in the state courts, appears to acknowledge that the ordinance's goals are legitimate. Petitioner then appears, however, to make an overbreadth challenge, arguing that the ordinance not only prohibits the intrusion of the clashing lifestyles but also those that may not otherwise conflict. As recognized in *Euclid,* however, zoning ordinances that exclude in general terms all establishments may not only exclude the offensive or dangerous, but may also exclude those that are neither offensive or dangerous.

> The inclusion of a reasonable margin, to insure effective enforcement, will not put

> upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation.

Euclid, supra, at 388-389.

Petitioner also cites a Connecticut Supreme Court case for the proposition that removing the right to rent is a significant restriction on the right of ownership, but acknowledges that was not a decision based on constitutional footing. Respondent agrees that restricting a right to rent is a significant restriction on the right of ownership, however, disagrees that it causes economic disadvantage and there is nothing in the record to support such a claim. The ordinance is designed so that persons petitioning Council for such a restriction can do so only upon asking Council to restrict their own right to rent their property as well. As such, the protections and the economic benefit afforded by the restriction are self-evident. People simply would not seek to strip themselves of the right to rent their property were it not economically beneficial. This is the likely reason Petitioner made no "takings" claim in the state courts.

III. EVEN IF A BENEFIT-BURDEN BALANCING TEST WAS APPLICABLE TO A DUE PROCESS ANALYSIS, THE BENEFITS OF THE ORDINANCE OUTWEIGH ANY BURDEN.

There appears to be little distinction between Petitioner's second and third arguments except in Argument III, Petitioner seeks to interject a benefit-burden balancing test into his due process analysis by citing the overturned district court decision of *Norton Theater, Inc. v. Gibbs,* 373 F. Supp. 363 (ED Mich. 1974). See *Young v. American Mini Theaters, Inc.,* 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976). Even if the *Norton Theater* decision had not been overturned, the benefit-burden analysis employed by the District Court in that case would have little applicability here since the standard was employed in an Equal Protection analysis of a classification restraining First Amendment rights in which the court applied a "test of close scrutiny." It was not used in a substantive due process analysis in that case or in any other due process claim Respondent is aware of.

Even if such an analysis was applicable to Petitioner's due process claim, the benefit to the property owners and society versus the burden imposed is, again, self-evident through the fact that two-thirds of the property owners petitioned to have the restriction imposed upon themselves. If the benefit were outweighed by the burden, people simply would not petition the Council to impose such a restriction upon themselves.

IV. A REQUIREMENT OF A TWO-THIRDS MAJORITY TO PETITION COUNCIL FOR AN ORDINANCE ESTABLISHING AN OVERLAY DISTRICT DOES NOT MEAN THAT ONE SET OF OWNERS DETERMINES THE EXTENT AND KIND OF USE WHICH ANOTHER SET OF OWNERS MAY MAKE OF THEIR PRIVATE PROPERTY.

Finally, Petitioner attempts to have this Court review the ordinance by misstating the nature of the ordinance and the similarity and applicability of the ruling in *State of Washington v. Roberge,* 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928). In *State of Washington v. Roberge,* this Court struck down an ordinance which required the consent of two-thirds of the property owners within 400 feet of any proposed philanthropic home for children or for old people before a permit could be issued. The court found that the land owners, not being bound by any duty, would be free to withhold consent for selfish or arbitrary reasons subjecting the landowner to their will or caprice and that a delegation of power in that regard was repugnant to the due process clause of the Fourteenth Amendment.

In this instance, there is no delegation of authority to the property owners – only a requirement that any petition to establish such an ordinance contain the signatures of two-thirds of the property owners so that the Council is assured that if it does pass an ordinance restricting the property rights, at a minimum there is a two-thirds "super majority" of the

property owners in agreement with the resolution. There is no obligation on the part of the City Council to adopt such an ordinance and it proceeds through the public hearing process in the same manner as any other zoning ordinance. As such, the argument that Petitioner is subjected to the "will and caprice of the adjoining property owners" is a misstatement of fact. There is no delegation of power – only a bar to a lesser majority's ability to petition for such an ordinance. Contrary to Petitioner's claim, one set of owners does not make a determination as to the use which another set of owners may make of their private property.

CONCLUSION

Petitioner is seeking review by this Court of an unpublished decision of the Michigan Court of Appeals. The Petitioner's main argument that the ordinance violates the Michigan Zoning Enabling Act is not a federal question within the jurisdiction of this Court. There is no merit to Petitioner's claim that the ordinance is not related to a legitimate governmental interest and Petitioner has set forth the wrong standards for analyzing due process claims by misquoting overturned District Court decisions. Finally, Petitioner misstates the nature of the ordinance as an improper delegation of authority where there is no delegation of power, but rather a bar to a lesser majority's ability to petition for an overlay district

restricting rental rights. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS M. HITCH (P25558)
McGINTY, HITCH, HOUSEFIELD, PERSON, YEADON & ANDERSON, P.C.
Attorney for Respondent
601 Abbot Road
East Lansing, MI 48823
(517) 351-0280

Dated: April 2, 2009

APPENDIX A

EAST LANSING CODE

ARTICLE II. ADMINISTRATION AND ENFORCEMENT*

DIVISION 1. GENERALLY

Sec. 50-31. Changes and amendments.

(a) The city council may of its own motion, or shall upon petition signed by the owners of a majority of the property proposed for rezoning, prepare an ordinance amending or changing the district boundaries or the regulations herein established. The ordinance shall, upon introduction thereof, be referred to the planning commission for review and recommendation. Prior to submitting its recommendation to the city council, the commission shall hold a public hearing, following notice thereof as required by section 202 of the Michigan Zoning Enabling Act, MCL 125.3202. For applications that require the submission and review of a traffic impact study under division 4 of this article, the required study shall be submitted with the application and forwarded to the city engineer for review. The study and the city engineer's report shall be submitted to the transportation commission for review. Final action on the application shall not be taken by the planning commission until the transportation commission has had the opportunity to review and comment on the

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* **Cross reference** – Administration, ch. 2.

application at a regular meeting. The city council shall, on receipt of the report of the planning commission, set a date for a public hearing for consideration of such proposed amendment, supplement or change. After public hearing upon such proposed amendment, supplement or change, following notice thereof as required by section 202 of the Michigan Zoning Enabling Act, MCL 125.3202, the city council may act upon the adoption thereof, with or without amendment. Whenever a written protest against such proposed amendment, supplement or change, signed by the owners of 20 percent or more of the area of land proposed to be altered or by the owners of 20 percent of the area of land within 100 feet of any part of the boundary of the land proposed to be altered, excluding any publicly-owned land from either calculation, shall have been filed with the city council, the ordinance providing for such proposed amendment, supplement, or change shall not be passed except by a two-thirds vote of all members of the city council.

(b) Following adoption of an ordinance to amend, supplement or change the district boundaries or the regulations herein established, the ordinance shall be filed with the city clerk and a notice of the ordinance adoption shall be published and mailed in accordance with the requirements of section 401 of the Michigan Zoning Enabling Act, MCL 125.3401. The ordinance shall take effect upon the expiration of seven days after its publication, unless a later effective date is specified by the city council, or unless a notice of intent to file a petition seeking to submit the

ordinance to the electors of the city for action is filed with the city clerk in accordance with the provisions of section 402 of the Michigan Zoning Enabling Act, MCL 125.3402.

(Code 1994, ch. 55, § 5.141; Ord. No. 1157, 11-8-2006; Ord. No. 1162, 4-17-2007)

APPENDIX B

EAST LANSING CODE

Sec. 6-175

1001.2 Exceptions. A rental unit license is not required under the following circumstances:

(1) Family occupancy. Any member of a family, as defined by chapter 50 of the City Code, including nieces and nephews, may occupy a dwelling as long as any other member of that family is the owner of that dwelling.

(2) House-sitting. During the temporary absence of the owner and owner's family of a domicile for a period not to exceed two years in any five-year period, the owner may permit up to two unrelated individuals or a family to occupy the premises without a rental license by notifying the code enforcement department, on a form provided by the department, of the address of the owner's temporary domicile, the projected duration of the owner's absence, and the identity of the unrelated individual or family who will occupy the premises during the owner's absence,

(3) One- and two-family dwelling sales. The sale of any one- or two-family dwelling intended for occupancy by the owner or owners of record which are to be occupied by the seller under a rental agreement for a period of less than 90 days following closing. The sale of any one- or two-family dwelling intended for occupancy under a lease with option to purchase agreement, life estate agreement or any other form of conditional sale agreement, shall require a rental unit license if

legal or equitable ownership is not transferred in its entirety within 90 days of execution of the conditional sales agreement.

(4) Exchange student, visiting clergy, medical caregiver, child care. For an owner-occupied dwelling, additional occupancy by exchange students placed through a recognized education exchange student program, one visiting clergy or clerical aide to a local church or congregation, or one person to provide child care or medically prescribed care.

(5) Estate representative. Occupancy by a personal representative, trustee, or guardian of the estate and their family where the dwelling was owner-occupied for the last year prior to the owner's death, and the occupancy does not exceed two years from the date of death of the owner by notifying the code enforcement department on a form provided by the department of the owner's name, date of death, and name of the person occupying the premises.

APPENDIX C

EAST LANSING CODE

Sec. 50-6

Family.

(1) Family means one person, two unrelated persons; or where there are more than two persons residing in a dwelling unit, persons classified constituting a family shall be limited to husband, wife, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson, granddaughter, aunt, uncle, stepchildren, and legally adopted children, or any combination of the above persons living together in a single dwelling unit,

(2) Anyone seeking the rights and privileges afforded a member of a family by this Code shall have the burden of proof by clear and convincing evidence of their family relationship.

(3) Domestic unit: As herein defined, a domestic unit shall be given the same rights and privileges and shall have the same duties and responsibilities as a family, as defined herein for purposes of construing and interpreting this chapter. Domestic unit shall mean a collective number of individuals living together in one dwelling unit whose relationship is of a regular and permanent nature and having a distinct domestic character or a demonstrable and recognizable bond where each party is responsible for the basic material needs of the other and all are living and cooking as a single housekeeping unit.

(4) This definition shall not include any society, club, fraternity, sorority, association, lodge, combine, federation, group, coterie, or organization, nor include a group of individuals whose association is temporary or seasonal in character or nature or for the limited duration of their education, nor a group whose sharing of a house is not to function as a family, but merely for convenience and economics,

(5) Any person seeking the rights and privileges afforded a member of a domestic unit by this chapter shall have the burden of proof by clear and convincing evidence of each of the elements of a domestic unit.

(6) Nothing in this section shall be deemed to confer any legal rights upon any person on the basis of conduct otherwise unlawful under any existing law.

* * *

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

AGRIS PAVLOVSKIS,

Plaintiff,

-vs-

CITY OF EAST LANSING and SHARON A. REID, City Clerk,

Defendants.

FILE NO.: 05-523-NZ
HON. BEVERLY NETTLES-NICKERSON

DEPOSITION

of AGRIS PAVLOVSKIS, a witness called by the Defendants, taken before Trisha A. McElrath, CSR-0946, Notary Public, at the Law Offices of McGinty, Hitch, et al, 601 Abbott Road, East Lansing, Michigan, on the 24th day of July, 2006, noticed for the hour of 9:30 a.m.

APPEARANCES:

CYNTHIA LAW, P.C.
534 S. Capitol Avenue
P.O. Box 12082
Lansing, Michigan 48901
By: CYNTHIA LAW, (P52833)

On behalf of the Plaintiff.

McGINTY, HITCH, HOUSEFIELD, PERSON,
YEADON & ANDERSON, P.C.
601 Abbott
East Lansing, Michigan 48823
By: THOMAS M. YEADON (P38237)

On behalf of the Defendant.

METROPOLITAN REPORTING, INC.
(517) 886-4068

* * *

[26] BY MR. YEADON:

Q. With regard to those purposes that are set forth in the ordinance itself, do you have any disagreements with the purposes, do you think that those are legitimate purposes for an ordinance, if in fact the ordinance accomplishes what those say it is designed to do?

A. I think these are reasonable goals set by a community. So I, in principle, I do not object to them, but I believe that there are ordinances already in place other than 1035C that already achieve those goals.

* * *

Q. Now, you've lived in a close to a rental student rental population since 1988, correct?

A. Um-hum, correct.

Q. And you said that there's – it's not necessarily conducive to a family atmosphere because of the flow of people and that type of thing, correct?

A. Yes.

Q. And that's also true with the hours that the students generally keep different hours than us normal working [27] people, correct?

A. Correct.

Q. Okay. And sometimes, especially summer time, or when it's warmer out and people are just walking by and they create noise just by virtue of their own shutting doors, car doors, and talking, and just being awake at those hours, correct?

A. Yes. There are more active times of the year for students.

Q. But, also, people can disturb a neighborhood without necessarily violating one of the ordinances, would you agree with that?

A. I don't understand what you're asking.

Q. For instance, when it's 4 o'clock in the morning and you've got a group of people coming home and slamming their car doors as they get out of their car, it's not necessarily a violation of a law, but it creates noise that can disturb a neighborhood, correct?

A. Yes.

Q. And even just at those hours of the morning, even just normal voices that would go unnoticed during the day can sound loud and disturbing, correct?

A. Yes.

Q. So there are – would you agree that there are certain life style differences between the student [28] population and the residential population that kind of clash?

A. Yes.

* * *

[35] BY MR. YEADON:

Q. If I understand your objection, then, you would have been comfortable with the overlay district ordinance if it had not included the houses facing Ann Street?

A. Yes. Once I saw the plan, it did not make much sense to me that the plan – I had though perhaps a study had been done prior to that, but during the Freedom of Information Act, I learned that nothing had been other than the good wishes of petitioners. So, yes, I would thought it would make more economic sense to exclude houses facing that street.

Q. Okay. And with that modification, you wouldn't have any problems with the overlay Petition?

A. That's correct. At that time that was my chief concern was the affect of my property.

* * *